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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 1116

JOHN BONGIORNO,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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CHAMPLIN-PEALY COMPANY, CHICAGO 365

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STATEMENT.

It is believed that the court will more readily and more clearly understand the facts in this case if those facts are stated in the sequence of a chronological narrative, not beginning with the inception of this case in the District

Court and developing the facts in the order in which they were there adduced, but in the order of their actual occurrence.*

The Absence From This Record of the Supreme Court Transcript.

Before undertaking this chronological recital, however, it is important to observe and strongly emphasize the fact that, although all of appellant's contentions with respect to alleged lack of due process (except his contentions that a 199-year sentence is void and his claim that his trial was dominated by mass hysteria) are based upon the premise that a fair inspection of the record of his trial and conviction would disclose that there was no evidence whatever fairly tending to show his guilt, **the record in the Supreme Court of Illinois upon which he bases this first and fundamental contention, although available to appellant, was not introduced in the trial court and is not before this court.** In other words, the trial court and this court are asked to condemn the opinion of the Supreme Court of Illinois as without foundation in the evidence, **but the transcript of the evidence in question is not produced.**

An *abstract* of the record was introduced and appears in the record as physically attached to pages 1292 to 1292A. This abstract, in accordance with the Illinois practice in courts of review, was not the equivalent of the bill of exceptions in narrative form familiar to Federal courts. In the Federal courts, the "abstract" or narrative synopsis

* Logically, the question of this court's right to review the record in the Illinois Supreme Court should precede any review of that record. But in point of time, the record in the Illinois Court was made before a review of that record was sought in this proceeding. Moreover, an inspection of that record so thoroughly devastates the claim that Bongiorno was not shown to be guilty and did not receive a fair trial that a mere inspection of it disposes of any charges that it does not support the defendant's conviction and sentence, even if those charges could properly be considered in this proceeding, which we contend they could not. For these reasons, in this statement we follow the order of the actual occurrence facts rather than the sequence of the record.

of testimony is, if correct and complete, approved by the trial judge and takes the place of the full stenographic *verbatim* transcript. But in the Illinois Supreme Court, the abstract is prepared by counsel for appellant without supervision of any court. It is true that counsel for the prosecution did not deem it necessary to file a supplemental abstract; but nothing in the Illinois practice forbids the Supreme Court of Illinois to recur to the full record, which was before that court and is not before this court. **Indeed, it is because the Supreme Court is entitled to consult the full record that it is filed with the abstract.**

It is an important contention of the Warden that neither the district court nor this court has any means of passing upon appellant's serious charge that the Supreme Court disregarded the evidence taken at the petitioner's trial when a complete record of that evidence was before that court but has not been presented to the District Court or to this court.

The necessity for producing the original transcript in order to support appellant's charge that the evidence was disregarded was not and could not have been waived by counsel for appellee in this case. (See **Argument**, Point I, *post.*)

Nevertheless even the fragmentary abstract of record, prepared by appellant's own counsel in the State Courts and introduced as Respondent's Exhibit X in this Court (Tr. 1292A), leaves not the slightest question, either of fact or of law, that Bongiorno was guilty of the crime of murder or that, even if he had made an application for rehearing, which he did not do and, as we shall show, made no fair and substantial attempt to do, the application would not and could not possibly have done him the slightest good.

The Evidence According to Appellant's Own Abstract of the Supreme Court Record.

The following facts have never been disputed and are not disputed now:

On July 8, 1933, Bongiorno and one Ross King, also known as Kenneth Smith, pursuant to a confederation theretofore formed between them, entered the office of John W. Compton at 9 South Kedzie Street, Chicago, Illinois, for the purpose of robbing Compton and any other persons who might be present. A passenger elevator was located some distance from the office entrance. Near this elevator was a stairway that led from the ground floor.

When the defendants entered the office, King, who had a gun in his hand, ordered all present to stick up their hands. At that time the persons present were Compton, a young lady named Charlotte Taylor who worked for Compton, and a man named Jack Kiefus, who was sitting in Compton's private office transacting some business. The robbery occurred about noon. (Abst. 4.) King and Bongiorno searched Kiefus and Compton and "took what money they had." After they searched the men, they "opened up the safe and went through it." They then tied the men up and were ready to leave when there was "a noise at the door."

The door was kicked open and the deceased, Police Officer Harry Redlich, entered the office.

Bongiorno made a voluntary statement, admitted without objection and never challenged or questioned, which, for the immediate convenience of the court and because the several thousand pages of transcript in this case are nearly all based upon appellant's assertion that his conviction was groundless, is here reprinted *verbatim*. It is found on pages 15-20 of the Abstract and is as follows:

"Mr. Dougherty: What is your name?

A. John Bongiorno.

Q. Where do you live, John? A. 2222 Lewis street.

Q. You understand you are under arrest at the Warren Avenue Police Station? A. Yes, sir.

Q. My name is Charles S. Dougherty, I am an Assistant State's Attorney. This is Mr. Johnson back of you there, Mr. Erth, Captain Max Danner, Officer Madzinski, Officer Miller, Brady and this is Tom Harvey, a court reporter. Under the constitution you are not required to answer any questions that may be asked of you, but any question you do answer, or any answer you make must be free and voluntary on your part and they will be used against you at some future proceedings that will be instituted. No promises of immunity or reward are offered you for making any statement. You have not been abused by anybody, have you? A. No, sir.

Q. No one has mistreated you in any way? A. No, sir.

Q. Struck you or anything like that? A. No, sir.

Q. Now, where do you live, John? A. 2222 Lewis Street.

Q. How long have you lived at that address? A. Since September last.

Q. And when were you last employed by the Metropolitan Life Insurance Company? A. Last February or March.

Q. February or March of 1933? A. '32, a year ago this last March.

Q. Were you employed by Mr. Finder? A. Yes, sir.

Q. Where was his office located? A. North avenue and Larrabee.

Q. And you worked in the north part of Chicago? A. North branch.

Q. Well, John, now how long have you known Ross King here? A. About a month and a half.

Q. And you have seen him frequently since you first met him? A. I saw him about four times.

Q. Now, yesterday, July 8, 1933, what time of the day or evening did you meet him? A. Eleven o'clock I guess in the morning.

Q. And where did you meet him? A. In front of my house.

Q. And when you met him at 11 o'clock was he driving his automobile? A. Yes, sir.

Q. What kind of a car was it? A. A Ford.

Q. What kind of an automobile was it? A. A Ford coupe.

Q. When you got in the car did you drive the car? A. Yes, sir.

Q. Where did you drive it to? A. Drove it out to Madison and Kedzie.

Q. When you drove to Madison and Kedzie where did you park it? A. On the west side of the street south of Madison on Kedzie.

Q. Did you and Mr. King get out of the car then? A. He got out first.

Q. And then you got out? A. Yes, sir.

Q. On the way to Madison and Kedzie did you have any discussion about what you were going to do when you got there? A. There was a little outline, he told me there was something at that address, or building. He didn't know the address himself. He said he could get a few dollars out there.

Q. You went out there with the idea of holding the place up? A. If that is the way you put it.

Q. I don't want to put it, I want you to say. Was that your idea in going there? A. Yes, sir.

Q. What floor did you go to? A. Third.

Q. When you got up there tell us in your own way what happened from the time you first got up there until the whole thing was over? A. When I walked in the office—there are three rooms up there, a big room something like this, a little room there and a little room over there (indicating) and one of the doors had already been closed, and I supposed King was in there. I just stayed in the ante room, the big office as you come in, and I locked the door, I pushed the door, I did not lock it. It was only four or five minutes later someone tapped on the door and I asked

who it was and he said 'police officer, come on out.' So I went out in the hallway and he said 'what are you doing in there?'

Q. Who said that? A. The police officer.

Q. Did you afterwards learn what that police officer's name was? A. Yes, sir.

Q. What was his name? A. Mr. Redlich.

Q. How did you know he was a police officer? A. He has the insignia here, the cap, a badge, and a star pinned on here some place.

Q. Go ahead. A. He asked me what I was doing in there. I said, 'I am not doing anything' and I left the door open when I come out. When he told me to come out I come out and left the door open, pushed it back so I could see, and he would not shoot. When he asked me what I was doing in there, I said, 'I am trying to sell the man some insurance.' 'I come up for that purpose.'

Q. You did not come up for the purpose of selling insurance, did you? A. No, sir.

Q. You went up there for the purpose of holding the place up? A. Yes, sir.

Q. Go ahead. A. So I told him if he would allow me to put my hands down—he had already told me to put up my hands—I said if you permit me to put down my hands I will show you my credentials. I carried three or four cards with me, and I handed a card to him and he backed away from me then and told me to face the wall. He said, 'Anybody can have a card like this printed,' and I said, 'Well, then let me reach in my hip pocket and I will give you my wallet' because I had something in there to show I worked for the Metropolitan, not then, but at one time. He said, 'All right, hand it to me.'

He advanced a few steps and took the wallet from me as we were standing opposite the door facing west, and he made me stand close to the wall. I don't know what happened then. The first thing I know when I faced the wall, while I am facing this way, a shot rings out, and I saw a bullet hit here (indicating). You could see the plaster fall.

Q. How many shots did you hear? A. I didn't count them. I was scared.

Q. Did you hear anybody say anything immediately before the shots were fired? A. No, sir.

Q. Then after the shots were fired what happened? A. **I ran down a hall. There was a series of shots.**

Q. You ran? A. Yes, sir, south. I tried to open the door and get in an office. I thought some other squad come up and started shooting. I didn't find any door open, or I can't make an entrance. So I ran back towards the stairway and I saw the officer reeling in the hall. He had not fallen yet. I stopped and looked at him and then ran down the stairs.

Q. Where did you run then? A. Out on Kedzie avenue and I run north on Kedzie to Madison.

Q. And then east on Madison? A. East on Madison and north on the south side of the street to the first street that way (indicating).

Q. The first street east, and then you run north? A. Then ran north a half a block.

Q. To Washington boulevard? A. No, I didn't run to Washington boulevard. I just run to the alley.

Q. And then you ran down the alley and in some basement? A. Yes.

Q. And that was the basement where Captain Stege and Officer Madzinski arrested you? A. Yes.

Q. What did you do with your coat and hat? A. I was warm from running and then took off my coat and tie.

Q. You have been sitting here beside Ross King while we took this statement, just now? A. Yes, sir.

Q. And you know now that Ross King is the man that shot the officer? A. He said he was.

Q. You heard him say it? A. I heard him say it, yes, sir.

Q. How do you spell your last name? A. Bongiorno.

Q. And how old are you? A. 26.

(Signed) JOHN BONGIORNO.

Witnesses:

LT. CHAS. E. EGAN, 27th.

FRANK J. MALONE, 27th Dist."

Dr. Joseph M. S. Gorman, whose office was in the same building, was in his office when the screen from the suite above fell down in front of his window on the porch and a man leaped down on his radio wire. He heard somebody yell "Catch him, there was a robbery." (Abst. 7.)

He went up to the third floor, "and there was a police officer standing four or five feet from a man and said he was under arrest. The man had his **back** against the wall looking at the police officer. That was Bongiorno. **The police officer was in front of him.**" * The witness went down stairs to call the wagon. At the second floor another man, the same man who jumped out of the window, whom the witness identified as King, was coming up the stairs. (Abst. 7-8.)

Everyone agrees that the police officer was shot in the back. Dr. Goodman, the physician who performed the autopsy, testified that "there was an entrance wound in the back and an exit in front." (Abst. 7.)

Counsel for appellant, who cannot be too highly commended for the faithful diligence with which, without compensation, he has discharged his duty to his client in the lower court and in this court, has exploited to the uttermost the resourceful ability for which he has long been distinguished at the bar in an effort to capitalize upon a claim that there is no evidence to support the Supreme Court's pronouncement, found at 358 Ill. 173:

> "Bongiorno saw him come up the stairway with gun in hand behind the officer, and shoot him in the back. He gave no warning of King's approach, but when the officer reeled and fell he ran and attempted to hide away."

We contend in the argument that it is totally immaterial

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* Note that this testimony directly contradicts Bongiorno's claim made in his statement, *ante*, that his face was to the wall and that the policeman did not come within the range of his vision.

whether Bongiorno did or did not see the officer, *first*, because this court cannot review the record in the Supreme Court of Illinois merely for the purpose of impeaching its opinion on collateral attack, *particularly when that record is not before this court*, and *second*, because, even if this court could arrogate to itself the powers of a court of appellate review, Bongiorno would be guilty of murder upon the plainest and elementary principles of criminal law even if he did not see the officer and fail to warn him. Nevertheless we point out that counsel's contention that the statement of the Supreme Court is not supported by the evidence is not true. It is counsel, not the Supreme Court of Illinois, that is mistaken upon the question whether there was evidence in the record to show that Bongiorno saw King approaching the officer from the back and failed to warn King.

It is true that no witness testifies that Bongiorno saw the officer; but then no witness can competently testify to what another did or did not see.

But the evidence shows without doubt that the officer was facing Bongiorno and the assailant approached the officer from the latter's rear. Since testimony by a witness that A saw B is inadmissible as a conclusion, *the only possible means of showing, other than by Bongiorno's own testimony, that Bongiorno saw the officer would be to show that the officer was in the range of Bongiorno's vision. This was done.*

Now if Bongiorno was facing the officer and the assailant came from the officer's rear, it cannot be said that a court which infers, or, more properly, sanctions a jury's inference (if the fact is material, which it is not) that one facing another must have seen a man coming from such others rear has acted so arbitrarily, unreasonably, and capriciously, as to deprive appellant of due process of law

But there is another very cogent consideration which should be borne in mind if, upon any conceivable theory, this court deems it important to ascertain for itself whether there was evidence in the record that Bongiorno saw King before he shot the officer **and further deems it possible to make this ascertainment in the absence of a complete record.**

Bongiorno knew that the officer had been shot as a result of having interrupted the commission of a crime in which Bongiorno was engaging. Under the first principles of criminal law, one who is responsible for another's injury is bound to render him reasonable aid. The evidence shows that a doctor had an office on the lower floor. But Bongiorno, instead of aiding the man who was wounded as a result of the crime which Bongiorno had been committing until interrupted, fled and temporarily escaped. Deliberate and intentional neglect of a person whom one is bound to succor may, of itself, constitute murder even if the only effect is to shorten a life already doomed.

For this reason, appellee will contend in the argument that, if the question of Bongiorno's guilt or innocence—or, more properly, if the question whether there was any basis in the record upon which the Supreme Court could fairly convict Bongiorno—is before the court, though the record from which the determination must be made is not before that court, the uncontradicted facts demonstrate conclusively, as a matter of law, that Bongiorno was guilty of murder.

But, of course, it is contended that this question is not open to review in this case. Certainly if the question is the narrower one of whether the Supreme Court acted so arbitrarily in applying the law of Illinois to the uncontradicted facts, there is no basis for this court's action.

But appellee contends that even this question is not

before the court since, if for no other reason, the transcript of evidence has not been produced.

Appellant's Alleged "Petition for Rehearing" and the Facts Concerning It.

After the Supreme Court had affirmed Bongiorno's conviction, Bongiorno wrote out a paper which seems to have been a little more than a letter to the Supreme Court or its justices. The record shows that the district judge found that the prison officials authorized the transmission of this missive to the clerk of the Supreme Court of Illinois. The records of the Supreme Court of Illinois disclose no history of its receipt or disposition.

The record fails to show that any act of the State prevented the transmission of this communication to the court or its judges. But the evidence does show that the communication was not fairly recognizable as a petition for rehearing. Substantial rules, intended for the protection of the court and the public, were not complied with by the prisoner. He completely failed to serve any notice of this communication upon the Attorney General or the State's Attorney. He merely wrote to the court and its justices and asked them to reconsider his hearing.

He had been and presumably still was represented by counsel. In the argument we shall contend that rules of criminal procedure are adopted for the protection of the State and the preservation of the welfare of society, as well as for the protection of the rights of the accused; that an accused has no more right to seek a reconsideration of his case by informal correspondence with judge than has the prosecution a right to seek a conviction by *ex parte* communication, not in the course of any recognized judicial proceeding, to such judges.

We shall argue that even if it be assumed, though there

is no evidence or basis for the assumption, and even if we make the further groundless assumption that, having received it, he failed to present it to the justices, that the clerk received this communication, he no more denied petitioner due process of law by failure to present it to the justices than would any clerk or secretary to this court or one of its judges deny a litigant due process of law because he did not transmit an *ex parte* and *in camera* letter to a judge asking him to change a decision in a pending case, without notice to adversary counsel.

If it be assumed, without evidence or basis for the assumption, that the justices did receive this communication from the clerk and tore it up or ignored it, the prisoner was no more deprived of due process of law than would any litigant in this court be deprived of due process if one or all of its judges were to tear up a letter relating to a pending case and not served, even informally, upon opposing counsel.

We shall deal with the contention that the trial was conducted in an atmosphere of mob hysteria in the argument. We shall show that the charge is utterly and absolutely destitute of any foundation whatever.

The Opinion of the Circuit Court of Appeals for the Seventh Circuit.

The Opinion of the Circuit Court of Appeals for the Seventh Circuit, affirming the decision of the Federal District Court, Northern District of Illinois, Eastern Division, is printed herein as Appendix 1 to this brief.

ARGUMENT.

I.

None of Appellant's Contentions Could Properly Be Considered Because All of Them Depended Upon the Record of His Trial in the Criminal Court and That Record Has Not Been Produced in This Proceeding.

Under the Point following this one, the warden contends that, even if the record of appellant's conviction in the Criminal Court, which was the record before the Supreme Court of Illinois, were before the district court and before this court, the record could not be scanned on collateral attack to ascertain whether the Supreme Court acted in arbitrary disregard of the evidence therein contained. Such a practice, if indulged, would in effect entitle every prisoner in every state penitentiary to a review by the Federal courts of the basis of his conviction. (See Point II, *post.*)

But, if this court agrees with the arguments developed under the present Point, and we think that perforce it must agree with them, it will not be necessary even to read the following Points; **for the fact is that, although nearly all of appellant's contentions depend upon his assertion that the record in the Supreme Court contained no evidence whatever of his guilt, that record, although available to appellant, has not been introduced in these proceedings.**

This court is of course familiar with the very substantial and important differences between the appellate procedure in the courts of Illinois and appellate procedure in the Federal courts. In the Federal court it is the custom for counsel for an appealing litigant to prepare a synopsis, in narrative form, of all of the testimony comprised in the bill of exceptions and to procure a certification of that testimony.

The testimony thus certified constitutes the bill of exceptions. It is a part of the record on appeal.

But in Illinois, counsel for appellant, without judicial supervision, prepares, for the convenience of the court, an abstract of so much of the testimony as he deems material. The *verbatim* transcript of the testimony is, however, preserved in a bill of exceptions.

While the Supreme Court of Illinois has many times said that it need not search the transcript of record for matter not appearing in the abstract, that rule has never been held to **disable** the Supreme Court from scanning the record, particularly to find grounds for affirmance and not for reversal. If the court had no access to the record, there would be no point in filing it. No mere acquiescence by counsel for the prosecution in the abstract of counsel for a prisoner converts the abstract into a substitute for the full and complete transcript of the testimony or denies the Supreme Court access to and the right to read the transcript.

Still less would the willingness of the State's Attorney of Cook County to have appellant's abstract stand uncorrected **in the Supreme Court of Illinois** amount to a tacit stipulation that where it is contended on collateral attacks that there is not a word the abstract, without the record, should cast upon the Federal court not only the right but the duty to speculate as to the contents of the complete record and to declare a judgment of the highest court of Illinois as without foundation although the full record is not produced.

We emphasize that this court is being asked to declare that the Supreme Court of Illinois acted arbitrarily and in disregard of the evidence when the transcript of that evidence is not before this court.

Of course, the original transcript could have been pro-

cured. A request from Judge Barnes would certainly have been honored by the Supreme Court of Illinois or its clerk. But appellant, although contending that this transcript was absolutely destitute of evidence tending to show his guilt, made no request or attempt to procure the record which would have been so precious to him if his contention had merit and if it could properly have been considered at all.

It is difficult enough to find cases that, even by the most tenuous implication, can be read as indicating that a Federal court even may, much less is obliged to, read the transcript of testimony taken at a trial when there is no question of the court's jurisdiction *even where the complete record is produced.* (See Point II, *post.*) Appellants' counsel, despite an industry and professional devotion really superb in the case of an uncompensated advocate, has found no such cases.

Since there are no cases holding that a Federal Court must or even may read such a transcript even if it is produced, there is small wonder that we have found no cases that even consider, much less decide, the question whether a Federal court may, on a *habeas corpus* proceeding, declare that a record before a court of general criminal jurisdiction, although reviewed by the highest court of the State, contains no evidence justifying a conviction **when that record is not before the Federal court.**

We have found, however, a great many cases sustaining the general rule that, in suits seeking to impeach governmental action which is dependent upon the sufficiency of evidence and in which suits it is contended that evidence has been so arbitrarily disregarded that due process has been denied, the question cannot even be considered unless a full transcript of the evidence is provided. We cite, without extended comment, some of these cases:

Louisiana & Pine Bluff Railway Co. v. *United States,* 257 U. S. 114.

Spiller v. *Atchison, Topeka & Santa Fe Railway Co.*, 253 U. S. 117.

Hudson & M. R. Co. v. *Hardy*, 103 Fed. (2) 327, Cir. Ct. of Appeals, 2nd Cir. Apr. 10, 1939.

Mississippi Valley Barge Line Co. v. *U. S., et al.*, 292 U. S. 282.

Interstate Commerce Com. v. *Consolidated Freightways*, 41 F. Supp. 651.

In each of these cases, it was contended that a governmental agency had arbitrarily disregarded evidence. In each of these cases, the Supreme Court or a lower Federal court refused to pass on the claim in the absence of a complete transcript.

It is true that in each of these cases, only property rights, not human liberty, were involved. But the procedural principle is the same. Where it is contended that the denial of due process consists in the disregard of evidence, logic alone, as well as all of the cases on the point, support the self-evident principle that the charge cannot be considered in the absence of the evidence which it as claimed was arbitrarily disregarded; and this is logical is applicable to criminal cases, **which involve not only the rights of prisoners but the protection of the public**, as it is to suits involved property rights. There is no more reason why a Federal court should turn loose upon society a man convicted of murder on the ground that the evidence does not sustain conviction, when the evidence is not before the Federal court, than there is reason to impeach the findings of a governmental agency for want of support in a record that is not produced.

The public, too, should have the equivalent or converse implicate of "due process"; and judgments intended for its safety should not be set aside for want of evidence when the evidence is not produced.

Counsel for appellant has sought to take advantage of the candid stipulation of the Attorney General (Tr. 1291-2) that the State's Attorney was shown appellant's abstract for the Supreme Court of Illinois and did not object to it. Appellant desired to have the District Court apprised of this fact, for whatever it was worth. The fact was true and the Attorney General did not put him to the technical difficulty, which might have been considerable, of proving the simple truth of this fact.

But the fact was not at all material. It cannot possibly be construed as a stipulation that the abstract was a complete substitute for its record. That this is true appears from the language of the stipulation itself. Mr. Liebman said:

> "As I understand the practice there, I have never tried a case in the Criminal Court nor taken an appeal, but I am told that **the practice is that the State's Attorney will agree to incorporate the original transcript of testimony in the record,** provided that the abstract is submitted to him for approval prior to its being printed and filed, and I understand that same practice was followed in this case.
>
> The Court: That is stipulated?
>
> Mr. Cunningham: Yes, your Honor.
>
> The Court: Very well."

It will be noted that according to the very terms of the stipulation, the **original transcript of the record** was incorporated in the Supreme Court record.*

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* Incidentally, the practice is to file abstracts with the briefs. Whether an abstract is satisfactory to opposing counsel depends not entirely upon whether it is complete *but upon the points argued in the briefs.* There is no showing as to what contentions were made with respect to the evidence on what errors were assigned by Bongiorno. Particularly, *there is no showing that he claimed any constitutional rights in the Illinois courts on his writ of errors,* where he was represented by counsel of his own choosing. *There is absolutely no showing that he raised the point that the evidence failed to show that he saw the officer.* If he did not made this contention that he now presses so strenuously, there would be no reason to abstract additional evidence on the point, no matter how clear the evidence might be. He asked no instruction on the point.

Thus the Supreme Court of Illinois does **not** regard the abstract as comprising the complete record, as does a Federal court of review when an abstract is certified as a bill of exceptions. Neither did the State's Attorney so regard it **or he would not have made his stipulation contingent upon filing the original record.**

But counsel for appellant would have this court take an abstract prepared by appellant's counsel as the sole and only basis upon which to base his serious charge that the highest court of the State of Illinois acted completely and utterly without evidence.

We think it only fair to say that we do not charge counsel for appellant with having been remiss or negligent in failing to procure the original transcript of testimony in this case. His exertions in behalf of his client are a monument of indefatigability. It is not to be supposed that so able a lawyer would have relied upon an abstract, instead of upon the original transcript, if he had thought that the original transcript would do him any good. The presumption is that the actual record, not before this court, supported the Supreme Court's judgment.

It is inconceivable that counsel for appellant did not examine this record before preparing for this hearing, when we consider the earnestness and skill with which he has performed his thankless duty. The legitimate inference is that counsel, in the interests of a desperate case for a client whose interests he was bound to serve as an officer of the court, realized that he had better talk about this record in its absence than in its presence. This, we submit, was sound and able advocacy; for no lawyer, particularly one appointed to defend an indigent person, is bound to procure material which may be damaging to his client. He represented the prisoner, not the court or the State of Illinois.

We submit that once it is perceived that appellant has grounded nearly all of his claims upon matter concerning a record which is not before the court, the judgment of the district court must be affirmed at least so far as these claims are concerned.

II.

Even If Appellant Had Produced the Transcript of the Record in the Supreme Court, Neither the District Court Nor This Court Could Review the Same for the Purpose of Ascertaining Whether It Contained Evidence of His Guilt.

Under the preceding Point, we demonstrated that this court cannot consider appellant's contention that the record of his trial contained no evidence of his guilt because that record was not made available to the district court and has not been made available to this court. But even if the incomplete abstract be deemed to take the place of the record, or even if appellant had introduced the complete transcript of the record, this court could not read it with a view of ascertaining the presence or absence of proof of guilt because of a most fundamental and very well settled rule that the writ of habeas corpus cannot be used to inquire into any matter pertaining to proceedings culminating in a judgment of conviction except the matter of jurisdiction.

The case of *Knewel* v. *Egan,* 265 U. S. 442, is in point and is decisive of this question. In that case, the Supreme Court of the United States, speaking through its present chief justice, said at page 446:

> "It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would

> be subject to collateral attack and review on *habeas corpus* on the ground that no offense was charged or proved."

We need not collect the authorities which hold generally that a writ of *habeas corpus* may not be used as a substitute for a writ of error. They are cited in the trial court's opinion.

Since counsel for appellant has not been able to cite a single case—not one—in the annals of Anglican or American jurisdiction in which a court has utilized the process of *habeas corpus* to ascertain whether the prisoner was or was not proved guilty of the crime for which he is incarcerated, he addresses the question in the terms and accents of an appeal to the fundamental principles of organic law. He treats the question of the propriety of so examining into the prisoner's guilt as though the question were a novel one instead of an issue which has been settled adversely to him by many centuries of British and American jurisprudence.

However, we are quite willing to encounter him upon the merits of this question, without regard to the decided cases. Let us examine the consequence of the innovation which appellant's counsel would introduce into the law.

Granted an occasional, very rare case where a man is incarcerated with no evidence, or no "substantial" evidence against him, granted even, that in some of these rare cases, the man may, in fact, be absolutely innocent, if it were once admitted that such a prisoner might present a transcript of the evidence to a federal court on *habeas corpus,* every prisoner now confined would be entitled, at any time that he chose, by his mere assertion that the evidence was not sufficient to sustain a conviction, to visit upon Federal courts the duty of reviewing the evidence. Moreover, since the doctrine of *res judicata* does not apply in *habeas corpus* cases, he might present such a claim as often as he chose.

A great majority of these claims would be without merit. The occasional, almost hypothetical, case where real injustice would result does not justify the complete abrogation of the doctrine of *res judicata*, which has always forbidden scrutiny of evidence where jurisdiction was present.

The propensity of prisoners to make absurd and fantastic claims that they have been convicted in the absence of evidence is well illustrated by the case at bar; for under the succeeding Point, we shall show that the petitioner's statements in his sworn petition that there was no evidence of his guilt are so patently false as to be perjurious.

We submit that even if the appellant had submitted to the district court a complete transcript of the record of his conviction, which he did not do, the court could not properly have inspected it except to ascertain the presence or absence of jurisdiction.

III.

Even If This Court Could Review Appellant's Conviction as Though Upon Appeal or Writ of Error, There Would Not Be the Slightest Basis for Discharging Him.

Under Point I, we demonstrated that the district court and that this court cannot review the record of appellant's conviction because the lower court and this court have not been supplied with the **record**.

Under Point II, we demonstrated that the lower court and this court could not review such record because they do not have the **jurisdiction**.

Under the present Point, however, we make the concession, purely as an assumption *ex gratia* and for the sake of argument, that this court might examine the record with a view to ascertaining the substantive question of appellant's

guilt and we make the further assumption that, although the Supreme Court of Illinois will not accept an abstract in lieu of a record, this court may do so.

Even in the presence of these unjustified concessions, this court would have no recourse other than to sustain the petitioner's conviction.

Now, the petitioner admits that he participated in a robbery. His defense was a most highly technical one. He contended that, because he had been formally arrested by an officer, he was not guilty of the murder which was the natural, probable and proximate consequence of the robbery in which he was engaged. His counsel in this case cites no authorities sustaining that position because there are none. The Supreme Court of Illinois held in appellant's case, that the mere fact that one of several participants in a robbery has been reduced to technical custody does not exonerate him for a murder committed by a confederate while both confederates are on or about the premises and before the arrest has been made really effective. Bongiorno was not in any effective custody, as subsequent events proved, as long as his confederate was at large, armed with a revolver, and bent on rescuing him.

The utmost that could be conceded to appellant was that the question whether this technicalityof arrest constituted a defense under the criminal law of Illinois was one for the Supreme Court of Illinois. The Supreme Court of Illinois ruled on that question adversely to appellant. Its ruling is conclusive; for the matter is only one of State jurisprudence. But even if this court were at liberty to review that ruling *de novo*, we submit that it would never hold that the defendant was not, under the circumstances here shown, guilty of murder.

But there is still another fundamental principle upon which the conviction would have to be affirmed if this court

could review it as though on appeal. Although it is probably the common law that one who is in no way responsible for another's wounds may callously neglect him and let him die when it would have been easy to aid him, even this rule is contrary to natural morality. The courts have always been quick to seize upon duties arising out of the relationships of the parties to hold that one who, being under a duty to tend or succor another, maliciously disregards that duty, is guilty not of manslaughter but of murder. (*Lewis* v. *State*, 72 Ga. 164; *State* v. *Reese*, 40 Mont. 570.)

It is well settled that one who is responsible for another's injuries must give him reasonable care. It is likewise well settled that one whose acts will naturally and probably, even though not certainly, result in another's injury, is responsible for that injury.

Since the natural and probable result of a robbery is, unfortunately, that police officers or other persons will be seriously wounded, the wounding of the deceased in this case was clearly one for which Bongiorno was responsible. He was therefore under a duty to succor him. He did not do so, however, but fled.

It is of course immaterial that the officer might have died anyway. Anything that tends to shorten life is, we submit, a killing.

So far, we have been discussing this question as though it were before this court on an appeal or writ of error. But of course, this court is not bound to determine whether the evidence showed Bongiorno guilty of murder. We submit that this court cannot even read the record for the purpose of determining any question other than that of the presence or absence of jurisdiction. But even appellant asks this court to read the record only for the purpose of ascertaining whether appellant had been deprived of his liberty without due process of law.

We submit that, even if the court can construe "due process of law" to mean "presence of some evidence showing guilt", it cannot hold that the Supreme Court of Illinois acted arbitrarily in solving what was, at the most, a question of Illinois jurisprudence, namely, the question as to where felonious complicity ends and passive inertia as a prisoner begins. The most than can be said is that, like questions or proximate cause, reasonable care and *res gestae*, the question was one for the sound discretion of the courts of the state. It is not a question for the federal courts.

IV.

Appellant's Contentions That He Was Denied Due Process of Law With Respect to His Alleged "Petition for Rehearing" Is Entirely Without the Slightest Merit.

In the first place, the trial court held that there was no showing that the state was responsible for the failure of the appellant's alleged "petition for rehearing" to reach the court. This question, if material, was one for the district court and has been settled adversely to petitioner. The district court said (54 Fed. Sup. 973, at p. 980):

> "There was no evidence that the letter was or was not transmitted."

Although we submit that the district court's judgment in this respect was correct, we do not rest our argument for affirmance solely upon this basis.

The plain truth is that, even according to appellant's own testimony, there was no "petition for rehearing" in any substantial or recognizable form.

Appellant and his counsel assume that, because appellant was unquestionably a rather ignorant man, he is in some way to be excused or pardoned for not understand-

ing the principles of law which are not merely technical but which have for their purpose the protection of the public. To admit the principle that ignorance of substantial rules excuses compliance therewith would be to place a premium upon ignorance and to make every man's intelligence, legal learning and mental skill the measure of his legal responsibility.

We presume that no one will dispute the fact that the Supreme Court of Illinois could abolish petitions for rehearing if it so chose, provided that it did so in all cases, equally, fairly and uniformly. Therefore, if it allows petitions for rehearing at all, which the federal constitution does not require it to do, it may not only prescribe the requisites for them, but, in virtual effect, **define** what in substance constitutes such a petition.

The practice at the time that Bongiorno was convicted was prescribed by what is now Rule 44 of the Rules of the Supreme Court. It is quoted at page 12 of appellant's district court brief and will not be repeated in full here. In addition to requiring notice within 15 days to the official reporter, a requirement which we concede is merely to prevent the inadvertent publication of opinions before they are final, and not of importance to the litigants in the case, and in addition to the fact that it requires such petitions to be printed, a requirement which we concede to be formal, for the convenience of the court, and not substantial, it contains the very important requirement of **both the fact of service and proof of that fact upon opposing counsel.**

Now this rule is no mere technicality. We are certain that counsel for appellant, with the reverence for due process of law, will concede, without our citing authorities on the point, that notice to an adversary litigant of attempts to change a judgment of a Supreme Court and of a lower court is of the very essence of due process. He

would be the first to complain that appellant had not received notice of such an intention of, had Bongiorno been discharged by the Supreme Court, a rehearing had been granted without notice to him on an informal letter to the judges.

Bongiorno's communication was not and did not fairly purport or profess to be a petition for rehearing. It was a letter to the justices asking a reconsideration of his case.

Many sincere people, not appreciating that the rules against *ex parte* communications with judges and justices are not mere proprieties or amenities of good form but are of the very essence of "due process", besiege judges with communications, written, personal and telephonic, seeking to influence their decisions.

The fact remains, however, that while one may regret the ignorance of these people, their actions, far from constituting legal process which the Federal constitution requires the Judges to consider, **actually amount to contempt of court.***

Even if it be conceded that the penitentiary officials have no right to interfere with the transmission of pleadings and other papers addressed to a court, the prison officials would not be bound to transmit a letter which had for its purpose an *ex parte* address to judges. The Clerk of the Supreme Court, if he received such a communication, might and probably would show it to the judges; but we submit that no litigant could complain if, for example, the clerk of this court or one of this court's secretaries tore up a letter addressed to its judges seeking to influence his decision.

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* Had the justices received Bongiorno's letter and, instead of treating it as a petition for rehearing, entered a rule on him to show cause why he should not be held in contempt for an *ex parte* attempt to influence the decision of a matter still within the breast of the Court, we are certain that the Supreme Court of the United States would never have reversed.

Even if it be assumed that the judges read this letter, they were not bound to treat it as a petition for rehearing or even as an act in the history of proceedings of record. They would be justified in regarding it as precisely what it was, namely, a wholly unauthorized, improper and unlawful, even if sincere and pathetic attempt to influence their judgment other than in accordance with the fundamental canons of judicial procedure.

We are serious on this point. Appellant was represented by counsel. He does not contend that he was indigent or that his counsel would not, upon proper request, petition for rehearing. He, like many other litigants, chose to write a letter to the judges. For some reason or other, no record of this letter appears in the archives of the Supreme Court of Illinois. There is no reason why it should so appear.

We submit that appellant filed no petition for rehearing.

But let us go further, let us assume, *first,* that appellant's document constituted a petition for rehearing, although it did not; *second,* that either the prison officials or the clerk of the court suppressed it, or, alternatively, that the judges or the clerk tore it up, although the district court refused so to find; and *third,* that, had it been received by the court, it would have been the court's duty to treat it as a petition for rehearing and review their opinion and judgment; and *fourth,* that the petitioner was unlawfully deprived of his right of review.

Each of the assumptions above made is without foundation. But even if they are all indulged, petitioner has not charged want of due process. His counsel recognizes that the question is one of the "totality of the facts viewed in the setting of this case." Appellant's counsel desires this court to sit as a court of review for the purpose of determining whether there was evidence of appellant's guilt

but **not** for the purpose of determining whether, had the justices received this communication and treated it as a petition for rehearing, they would have allowed it. If the question is one, not of the technical nicety of a right to a rehearing, but of a "totality of the facts," it is obvious that no court would have granted a rehearing in this case.

But if appellant's counsel retorts to this argument that this court should not pass upon the question of what the Illinois Supreme Court would have done, then we say that appellant has asked this court **not** to view the "totality of the facts", but to determine whether a purely technical right of appellant to have a groundless petition for rehearing considered has been violated.

(We are still assuming, for argument only, that the communication should be treated as a petition for a rehearing.)

If the basis of due process is not "totality of facts" but technical rights, then no such rights exist because appellant did not comply with rules governing petitions for rehearing. If the basis of due process is not technical rights but "totality of facts," then it is important to determine whether there was any reason in the merits of the case, or "totality of facts," why the Supreme Court should have set aside its absolute and peremptory rules of practice and should have overlooked a complete failure to comply with those rules. The request for rehearing being devoid of merit, there was neither technical nor substantial failure of due process in connection with a communication which did not comport with the absolute rules and suggested nothing that could have afforded grounds for rehearing.

We submit that appellant's contentions with respect to the alleged "petition for rehearing" are absolutely groundless.

V.

Petitioners' Argument That Was Tried in an Atmosphere of Hysteria Is Without Merit, First, Because the Record Does Not Support It, and Second, Because Petitioner Made No Objection to Either the Time or the Place of His Trial. Either Postponement of the Time or Removal of the Place of Trial, Except at Appellant's Request, Would Have Violated His Constitutional Rights.

Appellant's counsel desperately seeking to discharge his duty to his client, contends that appellant was tried in an atmosphere of mass hysteria. In the first place the record is absolutely destitute of support for this contention.

Indeed, appellant's argument proves too much. At page 32 of his trial court brief, appellant argues in substance that no person could have received a fair trial in the summer of 1933 in Chicago. In other words, if the court should accede to this contention, every person convicted during that summer would be summarily entitled to his discharge. This would merely add to the hysteria and would initiate a vicious cycle ending in anarchy.

Moreover, the verdict in this case shows that the jury was not prepossessed by hysteria. A very sober, dispassionate and conscientious jury might very well have sent appellant to the electric chair for the murder in which he was a participant. It is true that the jurors must have heard of the great danger to human life from robbers and gunmen. It was their duty as jurors to take cognizance of this menace to the community and, when convinced of a prisoner's guilt, to impose a sentence upon him which should afford society substantial protection.

The killing of public servants in the commission of purely

mercenary robberies is not one which a jury can be expected to condone. Appellant's jury, however, mercifully discriminated between the man who fired the shot and the man who, as the Supreme Court of Illinois later held, was equally guilty legally. They spared Bongiorno's life, in spite of the fact that he was one who contributed to the menace that counsel says bereft all juries in 1933 of reason.

But there is yet another answer to this absurd contention of appellant. The Constitution of Illinois provides that the accused **must** be tried speedily and in the jurisdiction where the crime was committed. Only the defendant can waive his rights either (a) to a speedy trial, by asking for a continuance, or (b) to a trial in the county where the crime was committed, by applying for a change of venue. Appellant did neither.

We ask this simple question: If it is granted, without any basis for the assumption, that the county was surcharged with prejudice against Bongiorno, who had admitted complicity in the killing of a police officer, what would appellant's present counsel have had the state do about the matter?

If they held Bongiorno in the county jail until this (supposed) wave of hysteria subsided, they would have had to discharge him for failure to give him a speedy trial. If they had taken him to a county in which the crime was not committed, he would promptly have been acquitted for failure of venue. The only other alternative would have been to turn him loose without a trial at all, which is substantially what appellant asks this court to do at this time.

Bongiorno and his counsel were evidently satisfied with a speedy trial in Cook County. The State could neither delay nor remove the trial. We are certain that this court will not, eleven years later, give the slightest countenance to this claim of mob spirit.

VI.

Appellant's Contention That the Sentence Is Cruel and Unusual Is Without Merit.

Appellant completely ignores the relevant principle, which is one of Illinois' criminal law and not federal constitutional jurisprudence, that, in Illinois, every sentence is deemed to be for the maximum period of incarceration provided by law, subject to diminution by the Division of Correction, with the approval of the Governor, "in the nature of a release or commutation of sentence or commitment."

Parole is an act of executive clemency, nothing else. It is only upon this theory that, in Illinois, parole laws have been sustained as against the contention that they involved executive review of judicial action. (*People* v. *Joyce,* 246 Ill. 124; *People ex rel. Barrett* v. *Sbarbaro,* 386 Ill. 581.)

Appellant's contention has been ruled on adversely to him by the Supreme Court of Illinois. (*People* v. *Pace,* 362 Ill. 224; *People* v. *Rucker,* 364 Ill. 371; *People* v. *Hetherington,* 379 Ill. 71; *People* v. *Nowak,* 387 Ill. 11.)

Finally, let us concede that 199-year sentences are, in effect and substance, condemnations to imprisonment for natural life and are an attempt to circumvent the parole laws. Let us further concede, although the Supreme Court of Illinois has held the contrary, that, in so far as their intent is to circumvent the parole laws, such sentences are *ineffective* for this purpose. Even under this concession, the unmost that could be conceded appellant is that, at the end of twenty years, he may assert his claim that his sentence is in effect a sentence for life and that he is entitled not to parole but to a hearing by the parole board, which *must* treat his sentence as one for natural life only and *may* grant parole. (*People* v. *Nowak,* 387 Ill. 11.)

If his contention were well founded, he would have a right to such a hearing, which he could enforce, not by *habeas corpus* but by *mandamus*, at the end of twenty years. In no event would he be entitled to be summarily discharged from custody.

Conclusion.

For the reasons urged in this brief and expressed in the opinion of the Circuit Court of Appeals for the Seventh Circuit, we submit that the judgment now under review should be affirmed.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the
State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

APPENDIX I.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8629. OCTOBER TERM AND SESSION, 1944.

UNITED STATES OF AMERICA, EX REL. JOHN BONGIORNO, *Relator-Appellant*, *vs.* JOSEPH E. RAGEN, Warden, Illinois State Penitentiary, *Respondent-Appellee.*	Appeal on Certificate of Probable Cause from United States District Court, Northern District of Illinois, Eastern Division.

January 5, 1945.

Before SPARKS, MAJOR, and MINTON, *Circuit Judges.*

MINTON, *Circuit Judge.* The petitioner-appellant, John Bongiorno, was convicted of murder. On appeal to the Supreme Court of Illinois, the conviction was affirmed. *People* v. *John Bongiorno,* 358 Ill. 171, 192 N. E. 856. Under the mittimus issued out of the Criminal Court of Cook County, Illinois, where he had been convicted, Bongiorno was placed in the custody of the respondent-appellee, the warden of the Illinois penitentiary.

Seeking relief from this judgment, the petitioner filed in the District Court for the Northern District of Illinois, Eastern Division, a petition for habeas corpus. Mr. Charles Liebman of the Chicago bar was appointed counsel for the petitioner to serve without compensation and he has devoted himself to his responsibility in a manner which this court highly commends. An amended petition was filed, and the matter was heard on the merits by the District Court, which denied the petition. The petitioner obtained

a certificate of probable cause from the District Court and gave notice of appeal from the judgment dismissing his petition.

The petitioner first challenges his conviction on the ground that there was no evidence to support it, that it was a mere flat judgment, the product of a sham trial, citing *Moore* v. *Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543. In that case five negroes were indicted, tried, and convicted of murder and were sentenced to death by a state court in Arkansas. In a petition in the federal court for habeas corpus, it was shown that their trial had been one in form only and that the defendants had been hurriedly convicted under pressure of a mob, who had agreed to accept a speedy legal execution in place of a lynching. The whole trial was carried on without any regard to the defendants' constitutional rights of due process. Because there had been in fact no trial, the parties having merely gone through the motions, the Supreme Court ordered that the writ should be granted and a hearing had.

Consider the contrast here. On July 8, 1933, Ross King and the petitioner conspired to commit robbery. It was about noon when they drove up before 9 South Kedzie Building in Chicago and entered an office on the third floor. Armed with a gun, they forced the several occupants of the small office to face the wall and then proceeded to rifle their pockets, the desks, and the safe. They were thus engaged when a rap sounded at the door accompanied by a shout, "Police officer. Open up!" Smashing a screen in one of the windows, King jumped to a nearby roof. The petitioner stepped into the hall and attempted to persuade the police officer that he was merely engaged in selling some insurance. While the officer stood in the hall questioning the petitioner, who had backed up against the wall with his hands above his head, King came up the stairway behind the officer and fatally shot him in the back. The petitioner fled and hid in a basement several blocks away, where he was later apprehended. When arrested, he made a voluntary statement, which was introduced as evidence at the trial.

On trial in the Criminal Court of Cook County, Illinois, the petitioner was represented by a paid counsel of his own choosing. The trial was before a jury. On advice of counsel the petitioner did not testify. At the conclusion

of the evidence, counsel argued the case to the jury, and the court gave its instructions. The jury retired and after deliberation returned a verdict of guilty. The jury fixed King's punishment at death and the petitioner's at 199 years in prison. Thereafter, motions for a new trial and in arrest of judgment were filed on behalf of the petitioner, were overruled, and judgment was pronounced on October 16, 1933, for a crime committed July 8, 1933.

A writ of error was taken to the Supreme Court of Illinois where paid counsel of petitioner's own choosing, or that of his relatives, represented him. A bill of exceptions including a stenographic report of the evidence was prepared and was approved by petitioner's counsel. It was stipulated that the bill of exceptions should be filed as a part of the record in the Supreme Court. The case was docketed and heard in the Supreme Court of Illinois, and the judgment of the trial court was affirmed on October 19, 1934. Petitioner received a copy of this opinion of the Supreme Court of Illinois on November 4, 1934, while he was serving his sentence in the penitentiary.

Petitioner is not a lawyer, but on January 24, 1943, he drafted what he termed a "petition for rehearing" and secured permission of the prison authorities to have it sent to the Illinois Supreme Court. Whether it ever reached that court does not appear.

The recital of these facts shows that this case has not the remotest resemblance to *Moore* v. *Dempsey, supra.* Petitioner here was tried and convicted in a court of competent jurisdiction to hear and determine the cause. The court had jurisdiction of the defendant's person. The jurisdiction of the cause and of the defendant's person was never lost. The case went by orderly procedure from the trial court to the Supreme Court under the protection and guidance of the petitioner's own paid counsel. He even had a change of counsel during the appeal. In contrast to sham proceedings under pressure of a mob, as in *Moore* v. *Dempsey,* the petitioner had an orderly, leisurely trial in every way conforming to due process.

The petitioner insists, nevertheless, that the evidence was not sufficient to support the jury's verdict, that there was in fact no evidence. We have read the opinion of the Supreme Court of Illinois and the admissions contained in the petitioner's petition for habeas corpus, and we are

satisfied that there is an abundance of evidence to support his conviction. Even if we disagreed with the Supreme Court of Illinois over the sufficiency of the evidence, we could give no relief for two reasons: First, we may not review in a habeas corpus proceeding errors of law committed by the courts of Illinois. *Frank* v. *Mangum*, 237 U. S. 309, 326, 36 S. Ct. 582, 59 L. Ed. 969; *Collins* v. *Johnston*, 237 U. S. 502, 505, 35 S. Ct. 649, 59 L. Ed. 1071; *Mooney* v. *Holohan*, 294 U. S. 103, 104, 55 S. Ct. 340, 79 L. Ed. 791; *Felts* v. *Murphy*, 201 U. S. 123, 26 S. Ct. 366, 50 L. Ed. 689; *Valentina* v. *Mercer*, 201 U. S. 131, 26 S. Ct. 368, 50 L. Ed. 693. Secondly, whether there was evidence to support the verdict involves the guilt or innocence of the appellant, with which on habeas corpus we are not concerned. As Justice Holmes said in *Moore* v. *Dempsey*, *supra*:

> "* * * what we have to deal with is not the petitioners" innocence or guilt but solely the question whether their constitutional rights have been preserved."

In a court of competent jurisdiction, whose jurisdiction was never lost or disturbed at any stage of the proceedings, the petitioner received a fair and impartial trial. That is due process. He can ask no more.

The petitioner contends that the failure of the Illinois Supreme Court to file and consider his petition for rehearing was a denial of due process. But the petition seems never to have reached that court. The burden is on the petitioner to show that his petition reached there before he can claim a denial of due process. This he has failed to do.

Petitioner also contends that his 199 year sentence is illegal, saying that the intent of the jury was to deprive him of the privilege of a parole after twenty years which a life sentence would have given him. We do not understand that an accused has any voice in what his sentence should be. The 199 year sentence is authorized by the statutes of Illinois[1] and has been held valid by the Supreme Court of Illinois, *People* v. *Pace*, 362 Ill. 224, 198 N. E. 319; *People* v. *Rucker*, 364 Ill. 371, 4 N. E. 2d 492; *People*

1. "Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term of not less than fourteen years." Ill. Anno. Stat. (Smith-Hurd) Ch. 38, § 360.

v. *Hetherington,* 379 Ill. 71, 39 N. E. 2d 361. The jury gave King, who did the actual shooting, the death penalty, and he was executed. They probably thought petitioner's life should not be forfeited, but that he should be kept in prison as a protection to society, for such a term as would consume all the remaining days of his life. That was not cruel and inhuman punishment. In our opinion, it met the standards of justice.

Furthermore, the petitioner's parole rights are a matter of clemency and grace, relating to prison government and discipline. *Farrell* v. *People,* 133 Ill. 244, 24 N. E. 423; *People* v. *Murphy,* 276 Ill. 304, 323, 114 N. E. 609. The petitioner is not up for parole. The question of when he shall become eligible for parole is not before us, even if we were competent to consider it. The sentence is authorized by law, and in no sense violates any constitutional right of the petitioner.

Finally, it is contended by the petitioner that his trial took place during a time of public hysteria over crime in Chicago, and that this hysteria deprived him of due process of law. Newspapers published at the time of the petitioner's trial were introduced as evidence. Although they do reflect considerable concern over crimes committed about the time of petitioner's trial, the comments had no particular reference to his case. Not only do they not touch his case, but they do not evidence any such degree of hysteria as to deprive the petitioner of a fair and impartial trial. It never occurred to petitioner to seek a change of venue. In our opinion this proof falls far short of establishing any such extreme situation as existed in *Moore* v. *Dempsey, supra. Frank* v. *Mangum, supra; Ashe* v. *Valotta,* 270 U. S. 424, 46 S. Ct. 333, 70 L. Ed. 662; *Powell* v. *Alabama,* 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158.

We have only to reflect upon the consequences of sustaining the petitioner's contention to discover that in that direction lies real hysteria. If we were to agree that at the time of the petitioner's trial, public sentiment in Chicago was so strongly prejudiced against anyone accused of crime that the petitioner could not have received a fair trial within the meaning of due process, then every other person convicted of crime in Chicago during that period would be clamoring for freedom, and would be entitled to it. We will not be a party to the creation of such a chaotic

situation purely upon the feeble proof introduced in this case. Indeed, we think we can take judicial notice of the fact that no such state of hysteria existed in Chicago at that time.

Clearly, the judgment under which the petitioner is held is in accordance with due process, and the constitutional rights of the petitioner have not been violated. The judgment of the District Court is

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.